

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISRICT OF PENNSYLVANIA

ANTHONY DeFRANCO,  
Plaintiff

v. CIVIL ACTION NO. 04-230 ERIE

WILLIAM WOLFE, et al.,  
Defendants

HEARING ON PETITION FOR TEMPORARY RESTRAINING ORDER

Proceedings held before the HONORABLE

SUSAN PARADISE BAXTER, U.S. Magistrate Judge,

in Judge's Chambers, U.S. Courthouse, Erie,

Pennsylvania, on Friday, September 2, 2005.

APPEARANCES:

ANTHONY DeFRANCO, Plaintiff herein, (via Phone),  
appearing Pro Se.

CHRISTIAN D. BAREFORD, Esquire, Deputy Attorney

Ronald J. Bench, RMR - Official Court Reporter

2

1           P R O C E E D I N G S

2

3           (Whereupon, the proceedings began at 11:30 a.m., on  
4 Friday, September 2, 2005, in Judge's Chambers.)

5

6           THE COURT: Good morning. Do you have Mr. DeFranco  
7 there?

8           PRISON COUNSELOR: Yes, I do.

9           THE COURT: Is he going to be on a handheld phone or  
10 a speakerphone?

11          PRISON COUNSELOR: Handheld.

12          THE COURT: Go ahead and give that to him.

13          PRISON COUNSELOR: Okay, here you go.

14 THE COURT: Mr. DeFranco?

15 MR. DeFRANCO: Yes.

16 THE COURT: This is Magistrate Judge Baxter. I will  
17 call the case now, then we'll get started. This is DeFranco  
18 versus Wolfe, et al., at Civil No. 04-230 Erie. Here in my  
19 chambers in the courthouse, besides myself, I have the staff  
20 attorney, Frank Fogl, Esquire, the court reporter, as well as  
21 counsel for the defendant, Christian Bareford, Esquire. And  
22 you, Mr. DeFranco, are with us by telephone on a handheld set,  
23 as I understand it?

24 MR. DeFRANCO: Correct.

25 THE COURT: Okay, we're here on your petition for a

3

1 temporary restraining order that was filed August 9th, I  
2 believe.

3 MR. DeFRANCO: Yes, your Honor.

4 THE COURT: It was signed on August 9th. We  
5 received it sometime other than that, but anyway. And we want  
6 to get started on that. It's my understanding that do you know  
7 why you were transferred back to Albion?

8 MR. DeFRANCO: I do not know specifically, your

9 Honor. I just know I filed a grievance. I attached it to

10 supplement the information in this case. You had granted that.

11 THE COURT: Now, you were at Smithfield?

12 MR. DeFRANCO: Yes, I was at SCI-Smithfield.

13 THE COURT: You've been at those two places

14 recently?

15 MR. DeFRANCO: Yes.

16 THE COURT: Your restraining order is requesting

17 that I enjoin any transfer of you from Albion, is that correct?

18 MR. DeFRANCO: That's correct. Retaliatory

19 transfers.

20 THE COURT: I have no control over that, I think

21 I've told you this before, where the Department of Corrections

22 transfers you. That they have a right to transfer you anywhere

23 in their system. There is case law on that, that the courts

24 will not interfere with that transfer order. Now, you can

25 complain, of course, that any transfer that is issued is

1 retaliatory in nature. But if we have no retaliatory transfer

2 in front of me, I cannot enjoin any future transfer because

3 they have a right to transfer, are you following me?

4 MR. DeFRANCO: Yes, your Honor.

5 THE COURT: If I had a transfer in front of me that  
6 you were claiming was retaliatory, I'd be able to look at that.

7 At least in the context of retaliation.

8 MR. DeFRANCO: Here's the foundation just briefly.

9 You granted a temporary restraining order on Albion --

10 THE COURT: That was about a year ago. It was done  
11 on Z-code status. I did not enjoin your transfer, as I recall.

12 I can read it, it's on page five -- in particular, plaintiff

13 has alleged that he has received continued threats from one or

14 more of the defendants. He will be transferred to another

15 correctional institution far away from his family if he

16 continues to pursue his Z-code status. The TRO lasted 10 days,

17 and then it dissolves automatically under the federal rules.

18 And then I did not grant a preliminary injunction.

19 MR. DeFRANCO: You did that based on Mr. Barr's  
20 declaration affidavit. That was a later recommendation based  
21 on him telling you there was no planned transfer.

22 THE COURT: No, I did that because of the court  
23 hearing we had. The court hearing we had and the evidence that

24 was in front of me. I believed I did not have, that we did not  
25 have enough to show the likelihood of success on the merits as

5

1 to Z-code status. I don't have that file in front of me,  
2 unfortunately. At any rate, none of that matters now. We're  
3 at a new point in time, all right. We're at a new point in  
4 time. You're coming to me and saying you don't want  
5 transferred from Albion for a retaliatory reason, mainly  
6 because of Mr. Barr, is that correct?

7 MR. DeFRANCO: It's not -- well, that was based upon  
8 what was conveyed to me by the processing staff when I was  
9 being processed out of Smithfield, something to the effect that  
10 you're going to take a bus ride, I'm going to be moved  
11 continually, is what it was meant to imply.

12 THE COURT: You know what, I have no control over  
13 that.

14 MR. DeFRANCO: As the court knows, I submitted, I  
15 forget which documents are attached -- the reason they moved  
16 me, your Honor, was based upon litigation.

17 THE COURT: It was based upon a formal separation

18 request from Mr. Barr, is that not correct?

19 MR. DeFRANCO: It says Mr. DeFranco has a formal  
20 separation in place from Mr. Barr, that is based on pending  
21 litigation.

22 THE COURT: I have no reason that it was based on  
23 pending litigation, as in the best interests of all parties  
24 that he not be housed at SCI-Albion.

25 MR. DeFRANCO: Correct.

6

1 THE COURT: That's correct. There is a formal  
2 separation with Mr. Barr.

3 MR. DeFRANCO: Right. And he gave you a  
4 declaration. If you look at that, based on his declaration,  
5 that there was no planned transfer for me. Eight days after  
6 Judge Cohill adopted the recommendation, I was transferred to  
7 SCI-Smithfield. And during our April 21st hearing at  
8 Smithfield, Mr. Skindell was on the phone, he sent a message to  
9 Mr. Barr that you were very disappointed that he basically was  
10 not truthful. And did what he did.

11 THE COURT: But now you're back at Albion, I'm

12 confused.

13 MR. DeFRANCO: Now I'm back at Albion.

14 THE COURT: That's correct. Somehow or other Mr.

15 Barr's separation request didn't last very long?

16 MR. DeFRANCO: Right. While I was gone I was hurt,

17 that's all part of my second amended complaint. It creates

18 numerous hardships, your Honor.

19 THE COURT: Understand, Mr. DeFranco, you are in

20 jail.

21 MR. DeFRANCO: I understand that.

22 THE COURT: We cannot take you anyplace you wish.

23 We cannot say you'll be there, you'll be there for a long

24 time -- it's not in the court's power to do that. The

25 Department of Corrections knows how much it cost to ship you

1 around, they understand all those things much better than the

2 court system does. They do what they believe is best for

3 everyone involved. I don't know what goes into that thought

4 process. But you are now back at Albion, somewhere you didn't

5 feel like you would ever be when I talked to you the last time



6 because you felt that Mr. Barr would sabotage any return to  
7 Albion. In fact, that didn't happen. So I cannot promise that  
8 you will not be transferred again. I can't do that, number  
9 one. Number two, I can't interfere with the Department of  
10 Corrections in its abilities to transfer a prisoner. And,  
11 number three, I cannot issue an injunction on something that is  
12 speculative and that I have nothing substantial to base it on.  
13 I don't know what else to say to you. I'm going to recommend  
14 that the temporary restraining order be denied on all those  
15 bases. All those bases are based on the law of this circuit.  
16 I can't go against those tenants of the law.

17 MR. DeFRANCO: I understand that, your Honor. I  
18 think that there is enough evidence to show you I've been  
19 retaliated against. I was harmed, it was done due to  
20 litigation. Furthermore, my file, somewhere in my file, Albion  
21 set up an additional reason, I guess it may have passed federal  
22 scrutiny, I'm not sure, for transferring me out. In addition  
23 to Mr. Barr, which I don't have in front of me, it's in my file  
24 somewhere. My counselor wouldn't give me the whole file.

25 THE COURT: Do you have any reason to believe, other

1 than they said you'll be taking bus rides, that you are about

2 to be transferred again?

3 MR. DeFRANCO: I have reason to believe, they

4 manufactured another reason besides the one we have in front of

5 us, that Mr. Barr placed his formal separation based on

6 litigation. That Albion sent Smithfield another reason, it was

7 manufactured, I believe, to pass federal scrutiny --

8 THE COURT: But none of that matters now. Now I'm

9 asking you, do you have a reason to believe you're going to be

10 separated from -- they sent you back. So all those reasons are

11 irrelevant. They sent you back.

12 MR. DeFRANCO: I understand that. The point is I

13 keep taking rides when they want me to, you know --

14 THE COURT: That's part of being in jail. It's

15 never comfortable, they never want it to be. But as long as

16 your constitutional rights aren't violated, I'll be weary of

17 that, but I have nothing more to go on. We have no reason that

18 you're about to be transferred at all.

19 MR. DeFRANCO: I want to follow the court, are you

20 saying they have not violated my constitutional rights at this

21 point?

22 THE COURT: We're not on this point. We're not here  
23 on this on your case, we're not at trial. We're here on a  
24 temporary restraining order based on the fact that you don't  
25 want to be transferred again for a retaliatory reason. I have

9

1 nothing to base this on, there's no basis in fact here that you  
2 are about to be transferred at all.

3 MR. DeFRANCO: I told you that was related to me --

4 THE COURT: You told me they said you'd be having a  
5 lot of bus rides. That doesn't hold up anything for me. Who  
6 was the person that told you that, what authority do they have.  
7 I don't know any of those things. So if you get a transfer  
8 order, you can renew this TRO. If you're claiming it's being  
9 done on a retaliatory basis. But the truth of the matter is if  
10 they were retaliating against you to keep you away from Albion,  
11 you would not have been sent back. It's making no sense to me.  
12 If Mr. Barr didn't want you there and he had some sort of  
13 power, you would not have been transferred back.

14 MR. DeFRANCO: Why did I leave?

15 THE COURT: I don't care about that, that's not in  
16 front of me. That's in your case, it's not in front of me now  
17 on this TRO, see what I'm saying?

18 MR. DeFRANCO: Right.

19 THE COURT: There's no basis in fact that you are  
20 about to be transferred out of there because they just sent you  
21 back. All I'm here to decide is are you about to be sent away  
22 for a retaliatory purpose. If there's nothing more than you  
23 don't want it to happen in the future, it's speculation, I  
24 can't issue a TRO on that basis.

25 MR. DeFRANCO: I don't believe it's speculation, I

10

1 believe it was conveyed during the process of being moved.  
2 Although, not high authority, as they were prison guards --  
3 it's likely to happen.

4 THE COURT: That's not enough. What I need from you  
5 is some sort of transfer order. And if you don't have a  
6 transfer order, then anything you say is going to happen is  
7 speculation, we just don't know.

8 MR. DeFRANCO: I could never have a transfer order,

9 I'm not allowed to possess those.

10 THE COURT: As soon you get information that you're  
11 going to be transferred, you have time to file a TRO.

12 MR. DeFRANCO: They told me the night before, like  
13 you get transferred on a Tuesday, Monday night you're sent to  
14 pack up your stuff, you're on the bus at 3:30 in the morning  
15 Tuesday. So there's no way for you to know. In other words,  
16 when they do this, they don't tell you in advance, your Honor.  
17 Like when it was done to me, I was told to go up to intake at  
18 7 o'clock Monday night, there was like 15 guards, they told me  
19 I was being transferred --

20 THE COURT: Mr. DeFranco, do you know how many  
21 lawsuits Mr. Barr has against him at Albion by prisoners at  
22 Albion?

23 MR. DeFRANCO: I have no clue.

24 THE COURT: I don't either, I know it's a lot. He  
25 just does not transfer people around, he doesn't have the

1 authority, quite candidly, to transfer people around because  
2 they sue him. So it would be in retaliation for what?

3 MR. DeFRANCO: I was already moved, I was already

4 transferred due to the litigation.

5 THE COURT: I don't care about that one, we're on a

6 different one. Why would he be retaliating against you by

7 transferring you, for what purpose at this point. Why do you

8 expect that there would be a retaliatory transfer?

9 MR. DeFRANCO: Based on when I was being processed.

10 THE COURT: This one guy told you you'd be taking

11 bus rides?

12 MR. DeFRANCO: Right.

13 THE COURT: You and I both know COs say lots of

14 things to keep people on their toes, to keep prisoners in line.

15 I have nothing more than that, I'm going to recommend that the

16 TRO be denied. That does not mean, Mr. DeFranco, that you

17 can't continually move for some sort of relief if something is

18 happening to you. But I can't do it on the speculative nature

19 of that comment, all right.

20 MR. DeFRANCO: Okay.

21 THE COURT: That's the way it's going to go. You

22 will see it when I issue -- I'm not going to do it on the

23 record today because I need the case law, we'll just do a quick

24 R & R.

25 MR. DeFRANCO: I want to ask you something. I never

12

1 received the report and recommendation for the April 21st

2 hearing. I got the final order from Judge Cohill.

3 THE COURT: That is because it was done on the

4 record, was it not.

5 MR. DeFRANCO: His order was sent by certified mail

6 to Smithfield.

7 THE COURT: But I did the report and recommendation

8 on the record in our telephone call. When I do that, he takes

9 the notes, but you don't get a copy of it, it's on the record.

10 MR. DeFRANCO: You just said that I received it by

11 certified mail your report and recommendation.

12 THE COURT: Maybe that was a different one. My

13 courtroom deputy says the final order, that you received it by

14 certified mail. Was that one of the TROs we did.

15 MR. DeFRANCO: Preliminary injunction.

16 THE COURT: I did that R & R on that one, did I not?

17 MR. BAREFORD: If I could be heard, your Honor.

18 THE COURT: This is Attorney Bareford.

19 MR. BAREFORD: What it appears, just according to  
20 document number 108, which is a motion to reopen injunction  
21 request, it appears as if Mr. DeFranco is asking to actually  
22 have an opportunity to submit objections to the report and  
23 recommendation from the April hearing.

24 THE COURT: See if you want to send objections to  
25 that, you're out of time.

13

1 MR. DeFRANCO: I never received the document, I want  
2 to know who signed for it, I certainly didn't. They're  
3 tampering with my mail.

4 THE COURT: There is a motion pending to reopen.  
5 That's for Judge McLaughlin -- I mean Judge Cohill.

6 MR. DeFRANCO: Judge Cohill.

7 THE COURT: That's for Judge Cohill to decide. I  
8 can't, he has to reopen his decision, not me. So if he grants  
9 that motion, then you'll get a copy and you can send the  
10 objection. If he does not grant that motion, then it will  
11 remain closed.

12 MR. DeFRANCO: Okay. I don't know if this is



13 relevant or not, your Honor, I believe it would be, I don't  
14 know if Attorney Bareford would know, the other reason why they  
15 use transfers after the fact it's not so it's not used again.

16 THE COURT: Maybe he can answer that, but from what  
17 I have here, the transfer was based on a formal separation  
18 request placed by Mr. Barr.

19 MR. DeFRANCO: I received that one. My counselor  
20 told me like three weeks later Albion sent him another one, an  
21 additional reason.

22 THE COURT: Do you know what that is, Mr. Bareford?

23 MR. BAREFORD: If I could be heard. Basically, what  
24 he's referring to is an element of his claim for retaliatory  
25 transfer with respect to the March, 2005 transfer from Albion

14

1 to Smithfield. That claim actually at this point is not in  
2 front of the court. When the first amended complaint he  
3 requested in March did not include the actual retaliatory  
4 transfer to Smithfield. Only with respect to the second  
5 amended complaint, which he just recently sought leave to  
6 amend. He doesn't actually have leave to amend that second

7 amended complaint yet. So this information, it specifically

8 has to do with --

9 THE COURT: Something that is not yet before the

10 court?

11 MR. BAREFORD: Precisely.

12 MR. DeFRANCO: That's totally inaccurate. You gave

13 me verbal permission on April 21st to amend this complaint.

14 Secondly --

15 THE COURT: It's not amended yet.

16 MR. DeFRANCO: I've already submitted it. You did

17 grant me permission to amend.

18 THE COURT: When did you submit it?

19 MR. DeFRANCO: Ten days ago, docket number 70.

20 THE COURT: Did you serve it?

21 MR. DeFRANCO: Yes, everybody was served. Document

22 number 70, that's where you gave me permission to amend and

23 supplement the second time.

24 MR. BAREFORD: My recall of that was that he can

25 seek leave to amend his complaint a second time. Any

1 reference, I certainly don't recall you giving blanket  
2 permission.

3 MR. DeFRANCO: Attorney Bareford --

4 THE COURT: Hold on, let me see what you filed, hold  
5 on. Motion to supplement the record. The docket sheet doesn't  
6 show a second amended complaint has been filed, that's what I'm  
7 concerned about. I have an errata sheet you filed on the 23rd  
8 regarding the second amended complaint exhibits. But I don't  
9 see that there is a second amended complaint.

10 MR. DeFRANCO: I in fact filed it. August 20th --

11 THE COURT: Well, on August 23rd, an errata, re  
12 amended complaint by Anthony DeFranco, reason for correction,  
13 exhibits to second amended complaint inadvertently admitted by  
14 petitioner. That's what we got on the 23rd.

15 MR. DeFRANCO: This is entitled plaintiff's second  
16 amended supplemental complaint.

17 THE COURT: Mr. Fogl is going to look, he thinks he  
18 saw something in our basket, he's going to check it.

19 MR. DeFRANCO: Your Honor, if just may real quick,  
20 does Attorney Bareford have the report and recommendation of  
21 the April 21st hearing?

22 THE COURT: Now, we have -- we see that yesterday

23 was filed a certificate of service of second amended complaint

24 by plaintiff, but we still don't have the amended complaint

25 anywhere.

16

1 MR. DeFRANCO: Did you receive a copy, Attorney

2 Bareford?

3 MR. BAREFORD: I've received a copy by way of people

4 he mailed, it appears as if he mailed them directly to the

5 people that he seeks to name as defendants without actually

6 seeking leave of the court to file --

7 THE COURT: He didn't file it with the court?

8 MR. BAREFORD: That's correct.

9 MR. DeFRANCO: I filed it with the court, I filed it

10 with the clerk.

11 THE COURT: It's not here -- it's not on the docket.

12 That means it never happened in our lives. Let's see. We had

13 a hearing on the 22nd of April.

14 MR. DeFRANCO: I thought it was the 21st.

15 THE COURT: It's docketed on the 22nd, I don't know

16 when it. It was docketed on the 22nd.

17 MR. DeFRANCO: Okay. During that hearing, your  
18 Honor, you specifically gave me verbal permission to supplement  
19 my complaint, amend this complaint due to retaliatory transfer.

20 THE COURT: My staff attorney told me that I  
21 typically say -- what he recalls I said is you may amend your  
22 complaint to include a temporary, to include a retaliatory  
23 transfer. I was not granting the motion to amend at that  
24 point. I'd like to see the amendments before I grant the  
25 motion.

17

1 THE COURT: I don't have it here, you're going to  
2 have to send it again, it's not been filed. The Clerk's Office  
3 doesn't appear to have it.

4 MR. DeFRANCO: Okay.

5 THE COURT: We're going to check the computer to see  
6 if what they docketed was the errata sheet -- hang on a second  
7 we'll check number 109. We have no paper anymore, as of July  
8 1st everything is online. If it came in, it as scanned on the  
9 computer and then it was thrown away.

10 MR. DeFRANCO: Okay.

11 THE COURT: What concerns me is if I had granted you  
12 the right to amend, I would have told you you had to do it in  
13 so many days.

14 MR. DeFRANCO: You said I had to exhaust.

15 THE COURT: What I do is say yes, you can amend to  
16 include, if I granted you that right, I would say you have to  
17 send that amended complaint within 30 days. That typically is  
18 what I do when I grant a motion like that. I don't give you  
19 forever. Because it keeps the defendants in limbo. They can't  
20 file any motions to dismiss. They can't file any motions for  
21 summary judgment. They can't even do discovery, you're a  
22 moving target, they don't know what claims they have against  
23 them.

24 MR. DeFRANCO: Does Attorney Bareford have --

25 THE COURT: Hold on a second, we don't even think we

1 have this thing filed, you'd have to file it again. And then  
2 you can ask Mr. Bareford whether he plans on opposing your  
3 motion to amend the complaint again. Then I'd have to look at

4 that and decide whether to allow the amendment under Rule 15.

5 MR. DeFRANCO: Right. I guess your report and  
6 recommendation, would that comment on anything in there about  
7 you granting me permission to do that or not?

8 THE COURT: Hold on a second -- here's what we have.  
9 We have something called a motion to supplement the record. It  
10 was filed on 8/23.

11 MR. DeFRANCO: That's separate, that's not it, your  
12 Honor. Or 8/24 -- you granted that.

13 THE COURT: So you have a separate second amended  
14 complaint?

15 MR. DeFRANCO: Right.

16 THE COURT: It didn't get filed here, it's not here.  
17 So we don't have it, you have to re-file it. Re-file it with a  
18 motion to amend.

19 MR. DeFRANCO: Your Honor, just for the record, I'm  
20 just -- I know you have many cases, I know for a fact that you  
21 verbally gave me permission to do it once I exhausted my  
22 grievances. And you were very upset at the time with Mr. Barr  
23 for doing what he did.

24 THE COURT: Well, let me take a look here --  
25 whenever I do that, that's always put on the docket. Here's

1 what it says on the docket. Hearing on motion, denied. Motion  
2 for order compelling summons acceptance -- motion for  
3 preliminary injunction, will be decided separately by R & R.  
4 Dismissed as moot. Motion for temporary restraining order  
5 dismissed as moot. Motion for preliminary injunction. But see  
6 none of that -- the R & R is then filed on the 26th. And in  
7 the R & R I didn't say anything about it and none of that was  
8 docketed on my -- it was docketed for that hearing. What I  
9 have here today and what I always have on a telephonic hearing,  
10 Mr. DeFranco, is my staff attorney writing down on a specific  
11 form everything that I order for that in that hearing. And  
12 then that is docketed. So whatever I said, he did not take as  
13 an order granting any motion to amend the complaint. Because  
14 that's not been docketed as such, which it would have had to  
15 have been, I must then believe that in fact I told you you may  
16 go ahead and do that, meaning you may go ahead and amend and  
17 file a motion to amend it. And those are granted liberally, I  
18 just have to go through the proper technical procedures. So  
19 you're going to have to go ahead and file a motion to amend



20 with it. I don't even have the second amended complaint here.

21 You'll have to file a motion to amend and attach the second

22 amended complaint again. Then, of course, I'll hear Mr.

23 Bareford's opposition if he wishes to oppose your motion to

24 amend again.

25 MR. DeFRANCO: I'll do that. I don't know why the

20

1 clerk didn't receive it.

2 THE COURT: I'm not sure, either.

3 MR. DeFRANCO: Everybody else did.

4 THE COURT: I'm not sure, it's not docketed and it's

5 not here. The only place where it can be now, what I meant by

6 telling you we're online, the only place here it would be is on

7 the computer. If it's not on the computer, it's not here.

8 Because if it's paper, if it's paper, it's gone. So I don't

9 know why. It could have been sent back to you, it may be

10 coming back because it wasn't accompanied by a motion to amend.

11 Sometimes that happens, it may be on its way back, the Clerks

12 won't accept it without an order granting your right to amend.

13 MR. DeFRANCO: Okay. But I don't know.

14 THE COURT: It's best to file a quick motion to  
15 amend, why you should be allowed to amend, attach a second  
16 amended complaint again and send it off.

17 MR. DeFRANCO: If I can, document number 70, if Mr.  
18 Bareford has it --

19 THE COURT: Hold on. Document number 70?

20 MR. DeFRANCO: Motion to amend, supplement the  
21 complaint second time. I believe it was granted by you on  
22 April 11th.

23 THE COURT: It says second time. Looks like I  
24 granted it on 4/11. The reason it says second time is because  
25 you filed the same motion twice because you hadn't heard from

21

1 me on the first one. That's what it said. We received the  
2 same motion with a short period of time. They're exactly the  
3 same one, the second one came in, you said I hadn't heard from  
4 you on the first one.

5 MR. DeFRANCO: I'll file it again.

6 THE COURT: You wanted to know if I had granted you  
7 the right to do a second time.

8 MR. DeFRANCO: What I'm concerned about, your Honor,  
9 I haven't received your report and recommendation in April, it  
10 may be mentioned in there. That was a big thing.

11 THE COURT: Let me take a look at that. I'm going  
12 to take a look at it right now. It's respectfully recommended  
13 that plaintiff's motion, document number 74, be denied.  
14 Plaintiff Anthony DeFranco, an inmate at the State Correctional  
15 Institution at Albion, brings a civil rights action pursuant to  
16 42 U.S.C. 1983 against -- okay. I'm looking at it here. On  
17 March 28th -- in addition, plaintiff complains that the  
18 treating psychiatrist immediately took him off of half of the  
19 anxiety medication -- as a result he seeks an order from this  
20 court requiring him to be transferred back to SCI-Albion  
21 requiring the immediate reinstatement of his full anxiety  
22 medication. On April 21, 2005, a hearing on plaintiff's motion  
23 for preliminary injunction was held by telephone. During this  
24 hearing plaintiff indicated that he has filed grievances  
25 regarding issues for which he seeks a preliminary injunction,

1 but has not yet fully his exhausted administrative remedies.

2 Then I go through the law on injunctions. In this case,  
3 plaintiff has failed to demonstrate a likelihood of success on  
4 the merits to warrant the issuance of a preliminary injunction.  
5 First, it is well-settled that plaintiff has no federal liberty  
6 interest guaranteeing that he remain in a particular prison, or  
7 preventing his transfer to another correctional institution,  
8 either within the same state or interstate. Then I cite the  
9 case.

10 MR. DeFRANCO: Okay.

11 THE COURT: All right. I quote the case, through  
12 the authorization conferred by 18 U.S.C. Section 4082, the  
13 Attorney General may transfer a prisoner from one place of  
14 confinement to any available and appropriate facility.

15 Second, with regard to the medical decision to  
16 decrease plaintiff's anxiety medication, it must be noted that  
17 courts will not second-guess the propriety or adequacy of a  
18 particular course of treatment which remains a question of  
19 sound professional judgment. A disagreement as to the  
20 appropriate choice of medical treatment does not give rise to a  
21 constitutional violation because the right to be free from  
22 cruel and unusual punishment does not include the right to the

23 treatment of one's choice. There is law on that as well.

24 Based on the foregoing, plaintiff cannot demonstrate  
25 a likelihood of success with regard to his claims to warrant

23

1 the extraordinary relief he seeks. Moreover, by his own  
2 admission, plaintiff has not fully exhausted his administrative  
3 remedies with regard to such claims. Thus, plaintiff's motion  
4 should be denied. That's it. Here it is, footnote one.  
5 "Nevertheless, plaintiff was informed during the telephone  
6 hearing on April 21 2005, that he may amend his complaint in  
7 this matter to include claims set forth in his motion for  
8 preliminary injunction." It's there. I know how I meant that,  
9 I meant that you have every right to do that. So, therefore,  
10 it's not a matter of exigency, it doesn't fit into a temporary  
11 retraining order format because you have a right to amend to  
12 include those claims.

13 MR. BAREFORD: Could I be heard on this.

14 THE COURT: Go ahead, Mr. Bareford.

15 MR. BAREFORD: The second amended complaint we  
16 received in the last week actually includes claims beyond

17 anything that has to do with transfer. Actually, names a host  
18 of new defendants, at a different institution, specifically at  
19 SCI-Smithfield, which attempts to incorporate deliberate  
20 indifference claims as cruel and unusual claims. At a minimum  
21 we would object to any of those new parties being identified  
22 just because they're at a completely different institution,  
23 those are separate claims. That should not actually be, he  
24 should not have the benefit of an amended complaint for  
25 allegations that took place with parties and claims that

24

1 arose --

2 THE COURT: That's true, in the footnote I simply  
3 said he may include the claims that he has made in that  
4 preliminary injunction, I didn't say anything about adding  
5 parties. You're going to move to amend to add additional  
6 parties and claims.

7 MR. DeFRANCO: In my preliminary injunction,  
8 listening to everything that was said, I did specifically say  
9 about a doctor mistreating me down there.

10 THE COURT: I didn't allow that. My footnote said

11 claims, I didn't say you could add parties. You'll have to do  
12 that by motion. You'll have to make your argument as to why  
13 you should be able to add parties at this late date. You know  
14 under Rule 15 how it works. Whether or not they're prejudiced  
15 by this at this time, whether or not there's been delay, all  
16 those sorts of things. So you will have to answer those  
17 questions in your motion to amend.

18 MR. DeFRANCO: Okay.

19 THE COURT: And the motion to add parties.

20 MR. DeFRANCO: Okay.

21 THE COURT: That's a different rule.

22 MR. DeFRANCO: As far as adding new parties?

23 THE COURT: 15(a), (b) and (c). Go ahead.

24 MR. DeFRANCO: Just as far as retaliatory transfer,  
25 do I need to file for permission or is that granted, can't I

25

1 orally ask for permission?

2 MR. BAREFORD: Your Honor, can I be heard on this.

3 THE COURT: Mr. Bareford has the right to respond in  
4 writing. If you want to do your motion orally, he has the

5 right to respond in writing. But I don't ever accept a motion

6 to amend until I see the amendments.

7 MR. DeFRANCO: Okay.

8 THE COURT: I can't decide the motion to amend

9 unless I know what you want to do. You have to attach the

10 proposed amendments.

11 MR. DeFRANCO: Okay.

12 THE COURT: You're going to explain to me why you

13 want to add additional parties, why they're necessary.

14 MR. DeFRANCO: Okay, that's fine.

15 THE COURT: Then he'll oppose it. Then you'll have

16 the right to reply.

17 MR. DeFRANCO: I'll file that, your Honor, no

18 problem at all. He sidestepped this, I want to clarify for the

19 record there was an additional reason why they transferred me

20 to Smithfield. I want to get that on the record so it's not

21 attempted to be used again. They brought me back in spite of

22 it.

23 THE COURT: Didn't your counselor tell you what it

24 said?

25 MR. DeFRANCO: She's here I could ask.



1 THE COURT: Didn't you say that your counselor told

2 you --

3 MR. DeFRANCO: Yes.

4 THE COURT: They didn't tell you what it said?

5 MR. DeFRANCO: No.

6 THE COURT: You don't know if those things, if

7 you're privy to those things or not.

8 MR. DeFRANCO: Considering the circumstances of the

9 case, we should.

10 THE COURT: There's some things you don't have a

11 right to know actually.

12 MR. DeFRANCO: They're manufacturing reasons --

13 THE COURT: The truth of the matter is if they are

14 going to use that reason to defend that charge, you'll find out

15 about it because the court will find out about it. If they

16 don't use that reason, then it doesn't matter, they're not

17 using it. I mean, they didn't attempt to hide at all that Mr.

18 Barr asked for separation.

19 MR. DeFRANCO: Absolutely. He's trying to hide the

20 fact he told me wasn't going to, then he did.

21 THE COURT: Either they will use this as a defense,  
22 whatever their other reason is or you'll see that then or you  
23 won't and it doesn't matter because it wasn't used as a reason.  
24 See what I'm saying?  
25 MR. DeFRANCO: Right.

27

1 THE COURT: He's not sidestepping anything, it's not  
2 part of the case yet, he doesn't want to have to defend  
3 something that is not part of the case yet.

4 MR. DeFRANCO: What do I need exactly to file?

5 THE COURT: You will need to file a motion to amend  
6 the complaint with your reasons and the persons you want to  
7 add. And attach to it the proposed amended complaint that you  
8 say you sent us but we don't have. Then you're going to get an  
9 R & R from today's hearing from me which says that I'm  
10 recommending that this motion for temporary restraining order  
11 be dismissed.

12 MR. DeFRANCO: That's appealable?

13 THE COURT: Once you get that, it will tell you you  
14 have 10 days to file objections. And then you file objections

15 to that to Judge Cohill, all right.

16 MR. DeFRANCO: Right.

17 THE COURT: Those things you have to do soon, are  
18 the soonest things you have to do. After that anything that  
19 comes up, then we'll just try to keep this thing moving. The  
20 reason I have a hard time continually granting the amendments  
21 is because then the case gets stalled. At some point you just  
22 have to file a new lawsuit. Do you understand how that works.  
23 They have to know what the claims are, they can't keep  
24 attacking a moving target. Then they have to do different  
25 types of discovery, the case just gets stalled, it gets too

28

1 old, the court can't deal with it at that point. That's why  
2 there has to be some review on the motions to amend. That's  
3 why those requirements in Rule 15 are there, that you can't be  
4 dilatory, you can't be causing undue prejudice to defendants.  
5 All right. That's why they are there.

6 MR. DeFRANCO: I understand that --

7 THE COURT: At some point you have to file your new  
8 lawsuit, do you see my point, do you understand?

9 MR. DeFRANCO: Right.

10 THE COURT: Okay.

11 MR. DeFRANCO: All right, your Honor, one last thing  
12 I need to ask you. Regarding Dr. Lindemuth and her testimony?

13 THE COURT: Yes, sir.

14 MR. DeFRANCO: The fact this affidavit is before the  
15 court, it came out later that everything she provided, certain  
16 information and testified to, I don't have them in front of me,  
17 how the court stands with that using her as a material  
18 witness --

19 THE COURT: Well, everything she said on the stand  
20 is part of the record. It was done under oath. Everything  
21 that she signed as an affidavit is done under oath. Everything  
22 that was in her affidavit is evidence, but wasn't evidence and  
23 testimony under oath. Whether those are used a trial or in a  
24 summary judgment motion or response, that's how they're looked  
25 at by the court. Some things are evidentiary, some things are

1 exhibits in evidence and some things are testimony under oath.

2 How the court looks at them and how the jury looks at them are

3 different depending on those things.

4 MR. DeFRANCO: If she wanted to clear anything up  
5 that she read in your report and recommendation regarding her  
6 testimony, that she disagreed with your interpretation of it --

7 THE COURT: But I don't care.

8 MR. DeFRANCO: I don't understand that. She came  
9 forward with other information.

10 THE COURT: She can file another affidavit.

11 MR. DeFRANCO: My brother did and I did --

12 THE COURT: None of that matters to me. If you go  
13 to trial on this case, she'll be back on the stand, you can  
14 cross-examine her the best you can.

15 MR. DeFRANCO: I guess what I'm asking at this stage  
16 is a motion to dismiss her statement, the defendants want you  
17 to use that testimony --

18 THE COURT: The defendants will use that testimony,  
19 what you will do is you will on a motion for summary judgment  
20 you will come back give an affidavit that says she said  
21 something else later and that will be hearsay.

22 MR. DeFRANCO: Okay.

23 THE COURT: That messes you up. You can ask her to

24 sign an affidavit saying that she said whatever you're saying

25 she said. And then if she signs that, then that is the

30

1 testimony. If not, if that comes from you, there's a hearsay

2 problem.

3 MR. DeFRANCO: Okay.

4 THE COURT: You understand why that is a hearsay

5 problem, you could say whatever.

6 MR. DeFRANCO: I'm able to depose her?

7 THE COURT: Absolutely.

8 MR. DeFRANCO: Make it part of the record?

9 THE COURT: Absolutely, you have to pay for it,

10 you're the plaintiff.

11 MR. DeFRANCO: I can do it now?

12 THE COURT: You can subpoena her for a deposition

13 and you have to ask for a subpoena form from us.

14 MR. BAREFORD: May I be heard on this?

15 THE COURT: Yes.

16 MR. BAREFORD: Just the way this has been going on,

17 Mr. DeFranco, will he be allowed to engage in discovery at this

18 point?

19 THE COURT: No, he can't engage in discovery --

20 MR. BAREFORD: There's a motion to dismiss pending.

21 So the first complaint that he filed, his first complaint that

22 he ultimately filed, I filed a motion to dismiss in its

23 entirety. To the extent he would attempt to seek any kind of

24 discovery at this point, I would actually file a motion for a

25 protective order --

31

1 THE COURT: There is no protective order, I didn't

2 put a ban on discovery, I leave it open so prisoners can do

3 whatever discovery they need to do because it's so hard for

4 them. The only way you can do a deposition is with the

5 cooperation of Mr. Bareford unless you subpoena and I'm not

6 giving you permission to, you have to move to get a subpoena

7 from the court to depose her. As a prisoner that's different

8 than other plaintiffs.

9 MR. DeFRANCO: Okay.

10 THE COURT: You have to move for a subpoena to

11 depose her to do this. That's another thing you have to do if

12 you're interested. If he gets it -- he just gave you a heads  
13 up on what he's going to say. He's going to say there is a  
14 motion to dismiss pending before this court, I'd rather not  
15 have discovery go forward until that motion to dismiss is  
16 decided.

17 MR. DeFRANCO: Right, I heard that. I understand, I  
18 heard what you said.

19 THE COURT: The reason that prisoners are required  
20 to move to depose people and to get these sorts of subpoenas is  
21 because there's money involved. You have to pay for that  
22 service. You have to pay for a court reporter for the  
23 deposition. You have to make sure that the person gets to the  
24 deposition. That's all on your plate. And a prisoner  
25 typically will file all sorts of subpoenas and then not follow

32

1 through with the costs thinking that because they're proceeding  
2 IFP those are free, that's not the case. So that's why they're  
3 required to move for those subpoenas.

4 MR. DeFRANCO: Okay. I guess now I understand.

5 THE COURT: All right. She's not a defendant, is



6 she?

7 MR. DeFRANCO: No.

8 THE COURT: You can't send her interrogatories or

9 anything. All right, we're adjourned, thank you.

10

11 (Whereupon, at 12:20 p.m., the proceedings were

12 concluded.)

13

14 - - -

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

-----

2

3

4

5 I, Ronald J. Bench, certify that the foregoing is a

6 correct transcript from the record of proceedings in the

7 above-entitled matter.

8

9

10

11 \_\_\_\_\_

12 Ronald J. Bench

13

14

15

16

17

18

19

20

21

22

23

24

25